Supreme Court, U. S.
FILED
NOV 17 1980
MICHAEL RODAK, JR., CLERK

No. 80-496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES C. BURNS; C. H. CARTER; LOUIS J. GIDDENS; DELBERT R. GRANDE; DAVID C. MILLIGAN; THOMAS M. POTTER; JAMES A. RIDDLE; W. R. TODD; JOSEPH O. TURNER, II; KENNETH E. MAGENHEIMER; JACK CLINE; and ROLAND L. LANCASTER,

Petitioners,

versus

GULF OIL CORPORATION,
a foreign corporation,

Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED A SUMMARY JUDGMENT IN FAVOR OF AN EMPLOYER, AND AGAINST EMPLOYEES WORKING UNDER A CONTRACT FOR AN INDEFINITE TERM TERMINABLE AT WILL, WHO WERE DISCHARGED BY THEIR EMPLOYER FOR THE ADMITTED THEFT OF COMPANY PROPERTY?

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STATEMENT OF THE CASE

This Petition for Writ of Certiorari arises from a *per curiam* affirmance by the United States Court of Appeals for the Fifth Circuit of a summary judgment granted in favor of Respondent, Gulf Oil Corporation ("Gulf"), in an action brought by Petitioners, twelve of its former employees who were employed as truckdrivers at Port Tampa, Florida. Each of the twelve was discharged in 1975 for taking gasoline from Gulf's Port Tampa facility. It is undisputed that each of the twelve Petitioners in fact took gasoline belonging to Gulf without payment; in fact, each Petitioner admitted having done so in his deposition.

The employment agreements between each of the twelve Petitioners and Gulf were on their face terminable at will by either Gulf or the employee. The contracts were of two basic types, one providing in pertinent part that "The employment of the Employee hereunder may be terminated by either party at any time," and the other providing that "Notwithstanding the rate of compensation above mentioned, the GULF OIL CORPORATION has the right to discharge said employee at any time . . .". Despite the clear language of these contracts, Petitioners filed suit against Gulf alleging, among other things, that their discharge constituted a breach of the employment agreements. Their complaint, as ultimately amended, attempted to convert their employment by Gulf into something more than a common law employment terminable at will by alleging that agents of Gulf had stated that following a six-month probationary period they would have a lifetime job with Gulf, and that employee benefits such as retirement plans, life insurance and the like, created a proprietary interest in their jobs which entitled them to be discharged only for

cause. After the initial complaint was twice dismissed and amended, Gulf moved for summary judgment on this breach of contract count, contending that under Florida law, it was entitled to discharge the Petitioners with or without cause, and that this right was not lost by the fact it provided employee benefits or by the alleged oral promises of a lifetime job. This motion was granted by the District Court.

At the time summary judgment was granted on the breach of contract claim, the complaint contained an additional count seeking recovery against Gulf for slander and the tort of "outrage" (intentional infliction of mental distress). Because of the combination of two causes of action in a single count, the court directed the filing of a third amended complaint setting forth the causes of action in separate counts. Petitioners utilized this opportunity to file a complaint which merely incorporated the bulk of the allegations previously made under the breach of contract count. Upon Gulf's motion, the District Court again dismissed Petitioners' complaint and instructed them not to file another cause of action under any title on issues previously ruled upon.

The same scenario was repeated in the fourth amended complaint, prompting the District Court to grant Gulf's motion to dismiss in a three-page order which outlined the history of the litigation to date and clearly indicated that the court was of the view that the fourth amended complaint violated the letter and spirit of the court's prior orders. The order advised the Petitioners that, because of the prior summary judgment ruling, they could not allege the unlawfulness of their termination or their loss of their rights to continued employment benefits, but could assert a claim for damages if they alleged that the manner and

method in which the termination was effected by Gulf amounted to extreme or outrageous conduct. The court directed the Petitioners to file a fifth amended complaint within two days of the date of the order and stated that Petitioners' "failure to comply with this final order will result in either the dismissal of the outrage count or *sua sponte* action pursuant to Rule 12(f) Fed.R.Civ.P." Gulf was also directed to answer the fifth amended complaint within two days of its filing.

A fifth amended complaint was filed and Gulf again moved to dismiss on the grounds that it was subject to the same defect noted in the court's prior orders. This time the court denied the motion to dismiss, but in its order indicated that it would "scrupuously [sic] supervise the introduction of evidence related to the elements of the tort."

Because the Petitioners' prior actions indicated an intent to try this suit on the issue of wrongful discharge regardless of the theories denominated in its complaint, Gulf immediately prior to trial filed a motion *in limine*. This motion sought to preclude the Petitioners, without first requesting the permission of the court outside of the hearing of the jury, from introducing any evidence on the following issues: (1) that other employees of Port Tampa Terminal of Gulf had taken products for their own personal use; (2) that employees of Gulf, other than employees of the Port Tampa Terminal, had ever been involved in any criminal or illegal activity or violated any company policy of Gulf with respect to taking products for personal use; and (3) that Petitioners were discharged for allegedly attempting to organize the union, to reduce the number of truckdrivers at the Port Tampa Terminal, for the purpose of shifting to independent gasoline haulers, or other "reasons" (as opposed to manner and method) of the Petitioners' discharge. Gulf sought the

in limine ruling to avoid having to object to immaterial and prejudicial matter, thus further implanting these facts in the minds of the jury, or alternatively not objecting and allowing the evidence to be considered.

This motion was considered in an in-chambers conference on the morning of trial. Interestingly, prior to the presentation and consideration of the motion, the District Court indicated its own intention to similarly limit the evidence. Following argument of counsel, the court granted the motion *in limine,* following which jury selection resumed. At 1:00 p.m. that afternoon, Petitioners requested an in-chambers conference with the District Judge. At that time they announced that, in light of the court's ruling on the motion *in limine,* they would join in a renewed motion by Gulf for summary judgment on the remaining counts of slander and outrage. In light of the fact that a jury had already been selected, the court indicated its unwillingness to grant summary judgment, even though the Petitioners had joined in the motion, if there was any contention that genuine issues of material fact remained to be tried. Petitioners' counsel accordingly stated on the record that, absent the evidence the court announced it had intended to exclude, there were no disputed issues of material fact and Gulf was entitled to judgment as a matter of law. Significantly, the District Court, in response to a comment by Petitioners' counsel that the court's ruling on the motion *in limine* had caught him completely by surprise, questioned Petitioners' counsel as to whether he would contend on appeal that he was deprived of his right to get ready for trial, to which Petitioners' counsel responded in the negative. Following the conference, the court entered an order granting final summary judgment, and a final judgment on the Petitioners' complaint.

Petitioners subsequently filed a motion for rehearing, in which they contended that the hearing of the motion *in limine* on short notice violated Rule 6(d) and 7(b) of the Federal Rules of Civil Procedure, and further sought disqualification of the District Judge on the grounds of bias and prejudice. The District Court denied the motion for rehearing. As to the request for recusal, it noted that it was neither sufficient in form to comply with 28 U.S.C. §144, nor sufficient in substance to require recusal even if the form had been proper (the motion alleged no bias arising from extrajudicial sources, but merely that the Petitioners considered the District Court's rulings unfair). As to the motion *in limine,* the court noted that the Petitioners in fact had actual notice of the points raised in the motion in time to prepare to meet them because the motion *in limine* merely reiterated and applied the court's earlier ruling on the same issues. Moreover, it noted that the Petitioners had in any event not been prejudiced by the ruling, because they were in exactly the same position as if the motion had not been filed, the evidence proffered at trial, and excluded upon objection.

Following the denial of their motion for rehearing, the Petitioners noticed an appeal to the United States Court of Appeals for the Fifth Circuit. Following briefing and argument, the Court of Appeals on June 4, 1980, issued a brief *per curiam* opinion affirming the judgment of the District Court in all respects. The opinion concluded there was no merit to the contract claim because the employment agreements were for an indefinite term and therefore terminable at will by either party under Florida law. The Court of Appeals similarly rejected the claim that the Petitioners should be permitted to maintain the action because of allegations they were fired for union organizational activities;

as the court noted, any such claim should first have been filed with the National Labor Relations Board. Finally, the Court of Appeals concluded that the Petitioners had not been prejudiced by the granting of a motion *in limine* on the morning of trial since they had not objected and had actual prior notice, and that an eleventh hour effort to disqualify the District Judge was on its face fatally defective under 28 U.S.C. §144.

Following the denial of Petitioners' motion for rehearing on July 2, 1980, this Petition for Writ of Certiorari was taken.

ARGUMENT

While Respondent Gulf finds the Petitioners' argument in support of its Petition for Writ of Certiorari in many ways confusing and hard to follow, it is clear that the gravamen of the argument is again to attempt to establish a basis upon which to contest the discharge of Petitioners, twelve truck drivers formerly employed by Gulf at its Port Tampa, Florida, plant, who were employed by Gulf under contracts of employment of indefinite duration terminable at the will of either party, and who were discharged by Gulf for the theft of company products. Each of the twelve discharged employees admitted on deposition in this action that they in fact had taken Gulf products for their personal use without permission or authorization.

Before the District Court and the Court of Appeals, Petitioners sought to establish a basis to attack their discharges by asserting that other aspects of the employment relationship between themselves and Gulf had converted the employment at will into something more. For example, they contended that the numerous fringe benefits offered by Gulf, Gulf's personnel policies, and even the obligation

of Petitioners, who were employed as truck drivers, not to disclose Gulf's trade secrets had the effect of giving the Petitioners vested rights in their jobs. Unfortunately for the Petitioners, there was clear law holding that such factors did not convert a common law employment terminable at will into vested employment rights and the District Court granted partial summary judgment on this contract claim.[1] The Court of Appeals affirmed this conclusion of the District Court, observing:

> There is no merit to the contract claim. The employment contracts were for an indefinite term and were terminable at will by either party. Thus, under Florida law Gulf had the right to fire the employees for any reason or even for no reason. *See Harrison v. Jack Eckerd Corporation,* 342 F.Supp. 348, (M.D. Fla), *aff'd,* 468 F.2d 951 (5th Cir. 1972). However, Gulf clearly had good cause — theft of company property, a major offense under the company rules. The plaintiffs' participation in employee benefit plans, such as retirement program and stock option plan, did not change the contract terms or give them a vested property interest in their jobs. *Id. Burns v. Gulf Oil Corp.,* 78-3263 (5th Cir. 1980) (unpublished slip op. at 2).

Implicitly recognizing that their contract claim was indeed without merit, Petitioners have based their Petition

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[1] In fact, this case terminated at the trial level when the Petitioners joined in Gulf's Motion for Summary Judgment as to the remaining counts of their Complaint after the District Court granted a Motion in Limine indicating that it was not going to permit the Petitioners to retry the breach of contract claim, on which it had already granted summary judgment, under the guise of the torts of slander and outrage.

for Writ of Certiorari upon an attempted revivification of allegations dismissed with prejudice by the District Court early in the litigation, and not argued before the Court of Appeals,[2] to the effect that these discharges, even under a common law employment terminable at will, violated the Petitioners' Constitutional rights to due process and equal protection and also portions of the civil rights laws, specifically 42 USC §1983 and §1985.

The basis of the alleged due process, equal protection and civil rights violations claimed in the petition is the assertion that, in discharging the Petitioners, Gulf "discriminated" against them because it failed to similarly discharge other individuals whom these individuals accused of having also stolen company products. Initially, it should be noted that the factual basis for this claim of "discrimination" is simply frivolous. It is undisputed that each of the twelve Petitioners discharged by Gulf in fact were guilty

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[2] Gulf would respectfully submit that the fact that the Petitioners rely almost exclusively on arguments not raised before the Court of Appeals is itself dispositive of the appropriateness of certiorari. As Rule 17 of this Court's rules points out, and the Petitioners' jurisdictional statement acknowledges, the considerations relevant to a grant of certiorari in this cause are whether the Court of Appeals' decision conflicts with decisions of other federal courts on the same matter or otherwise has so far departed from the accepted and usual course of judicial proceedings that it calls for an exercise of this Court's power of supervision. An assertion that the Court of Appeals reached an incorrect result because of its failure to consider arguments not presented to it, of course, can establish neither ground for certiorari review. Indeed, the only ground argued in this petition which was also raised before the Court of Appeals was a suggestion that Petitioners were discharged because of their union activities. However, the Court of Appeals explicitly described even this as a suggestion "tangentially toss[ed] in" by the Petitioners and, in any event, as the Court of Appeals noted, could not have been a basis upon which to sustain the action because such claims are committed to the exclusive jurisdiction of the National Labor Relations Board.

of the offense of theft of company property; indeed, each admitted the same on his deposition in this action. It is likewise undisputed that each individual who admitted the theft of Gulf property was discharged. The gravamen of Petitioners' charge of discrimination is that Gulf refused to discharge certain other individuals whom those employees who admitted the theft also accused of having engaged in the same conduct. Suffice it to say, Petitioners have never cited any authority which would require Gulf to take the Petitioners' unsupported allegations of wrongdoing against others at face value, or which would destroy the discretion to take such disciplinary action as it deemed appropriate.

However, more fundamentally, even if Petitioners' allegations were true, and Gulf had "discriminated" against them by failing to discharge others similarly situated, the short answer is that that does not invest the Petitioners with a cause of action against Gulf unless it can be demonstrated that the purported "discrimination" was on some ground prohibited by public law, such as racial or ethnic discrimination or the like. This, of course, is the precise point of *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273 (1976), cited by the Petitioners in their brief, and the earlier case of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), cited in *McDonald*. As this Court specifically observed in *McDonnell-Douglas*, a former employee's participation in an illegal "stall in" was more than sufficient justification to refuse to rehire him as an employee, subject only to the former employee's right to prove that such illegal conduct was not the actual reason for the refusal to hire, but merely a pretext for prohibited racial discrimination.

Of course, there is no allegation or suggestion that the Petitioners' discharge was the product of any racial or ethnic discrimination. Indeed, the only suggestion made by the Petitioners that Gulf may have considered any factor in deciding to discharge them other than their theft of company property, was the tangential assertion that these Petitioners may have been fired for union organizational activities.[3]

A short answer to this claim, however, is that if the Petitioners really believe they were discharged for union activities, the District Court was not the place to assert such a cause of action and indeed had no jurisdiction to entertain it. Rather, the Petitioners were required to have filed a complaint with the National Labor Relations Board, to whom has been preemptively committed the exclusive jurisdiction of allegations of discharge for pro-union activities. As this Court held in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959):

> When an activity is arguably subject to §7 [employee rights] or §8 [unfair labor practices] of the Act, the States as well as the Federal Courts must defer to the exclusive competence of the

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[3] Once again, the facts suggest that even this allegation was not seriously made and was indeed an afterthought. Indeed, any suggestion of a union connection to the Petitioners' discharge did not arise until well into the litigation, in the Petitioners' Second Amended Complaint. Moreover, even then it was not suggested that the Petitioners were discharged for union organizational activities. Rather, the Complaint alleged that the true reason for the Petitioners' discharge was not their theft of company products, but rather because Gulf wished to accomplish a reduction in force in its Port Tampa facility, in itself a legitimate reason for terminating employees. The Complaint then went on to allege that the Petitioners were selected to accomplish this reduction in force because of prior union activities.

> National Labor Relations Board if the danger of State interference with National Labor policy is to be averted.

For these reasons, there can be no equal protection claim arising from the Petitioners' discharge, since it is undisputed that the discharge was not motivated by any ground forbidden by public law. The absence of an equal protection violation, of course, also serves to dispose of the Petitioners' claim under 42 U.S.C. §1985, since it is settled that an unlawful conspiracy under this section must also emanate from racial bias or some other class-based discrimination. *Griffin v. Breckenridge,* 403 U.S. 88 (1971); *McLellan v. Mississippi Power and Light Company,* 545 F. 2d 919 (5th Cir. 1977) (*en banc*).

On the other hand, Petitioners' due process and 42 U.S.C. §1983 claims fail for the simple reason that they are simply not applicable to disputes between private persons such as Gulf and the Petitioners. Clearly, Gulf did not act "under color of state law" in exercising its common law rights to discharge employees terminable at will, and it is likewise settled that the due process clause does not apply to private persons. *Hines v. Cenla Community Action Committee, Inc.,* 474 F. 2d 1052 (5th Cir. 1973); *Northside Motors of Florida, Inc. v. Brinkley,* 282 So. 2d 617 (Fla. 1973). Thus, notwithstanding the Petitioners' assertion that there is "no substantive difference" between a public or private employer insofar as the protection of an employee's fundamental rights are concerned, Gulf would respectfully submit the well-settled law establishes that there is indeed a substantive difference between public and private employers with respect to the applicability of constitutional and statutory provisions designed to limit gov-

ernmental action or action taken under the color and protection of state laws.

CONCLUSION

For the reasons stated, it is respectfully submitted that there is no basis whatsoever for the exercise of this Court's certiorari jurisdiction in this cause. Initially, there is no basis for the exercise of jurisdiction for the simple reason that the Petition is based almost exclusively on arguments not even presented to the Court of Appeals, and accordingly, arguments which cannot present an opportunity for this Court either to correct an error by the Court of Appeals or to exercise its supervisory functions over that court. Additionally, there is no basis for certiorari jurisdiction for the simple reason that the arguments advanced in the petition are totally without merit, and are based on fundamental misunderstandings of the applicability and purposes of the due process and equal protection clauses and the civil rights laws. Accordingly, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing have been furnished, by U.S. Mail, this day of December, 1980, to Britt Whitaker, Esquire, 501 E. Jackson Street, Suite 200, Tampa, Florida 33602.

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Attorney